82-576

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

ROBERT F. PIERCE and URSULA S. PIERCE, Appellants

v.

DONALD W. BIERER, JR. and DOVER VOLKSWAGEN INC., a Delaware corporation, Appellees

ON APPEAL FROM THE SUPREME COURT OF DELAWARE

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY THE APPEAL

(1) Should this Court now reconsider its decision in Silver v. Silver, 280 U.S. 117 (1929), that "automobile guest statutes" do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

(2) Does the equal protection analysis employed in Silver v. Silver, supra, and relied upon by the Supreme Court of Delaware in upholding the validity of Delaware's Automobile Guest Statute, 21 Del. C. §6101, embody the correct equal protection standard of review as applied by the Court today in such cases?

(3) Under present-day conditions, does the classification drawn by the Delaware Automobile Guest Statute, 21 Del.C. §6101, as between "guests without payment"

and all other occupants of a motor vehicle, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

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THE OPINION BELOW

The opinion of the Supreme Court of the State of Delaware in this case is officially reported at 447 A.2d 1189 and is also set forth in the Appendix at p. 1a et.seq.

GROUND OF JURISDICTION

This case is an action to recover damages for personal injuries sustained by the Appellant Robert F. Pierce, in an automobile accident. At the time of the accident the Appellant was a guest passenger in an automobile operated by the Appellee Donald W. Bierer, Jr. and owned by the Appellee Dover Volkswagen, Inc.

The Supreme Court of the State of Delaware affirmed the granting of summary judgment in favor of the Appellees on the basis of the Delaware Automobile Guest Statute, 21 Del.C. §6101, which, by its terms, prohibits a cause of action by a guest passenger against the owner or operator of the vehicle, unless the accident was caused by the owner or operator's intentional act or his willful

or wanton conduct. In so ruling, the Supreme Court of Delaware explicitly rejected the Appellants contention that 21 Del.C. §6101, as applied, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The judgment of the Supreme Court of Delaware was entered on July 9, 1982. The notice of appeal to this Court was filed in the Supreme Court of Delaware on September 20, 1982

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2), this being an appeal from a final judgment rendered by the Supreme Court of the State of Delaware, where there was drawn into question the validity of 21 Del.C. §6101, on the ground that it is repugnant to The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and the decision was in favor of its validit

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1 of the

Fourteenth Amendment to the Constitution of the United States:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Title 21, Section 6101 of the Delaware Code which states:

> (a) No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident was intentional on the part of such owner or operator or was caused by his wilful or wanton disregard of the rights of others.
>
> (b) Subsection (a) of this section shall not relieve a public carrier or any owner or operator of a motor vehicle while the vehicle is being demonstrated to a prospective purchaser of responsibility for any injuries sustained by a passenger being transported by such public carrier or by such owner or operator.

STATEMENT OF THE CASE

On February 15, 1978, Appellant Robert F. Pierce was employed as a salesman for a pharmaceutical company. He had been making calls in the Dover, Delaware area that day and was staying overnight at a local motel. About 11:00 P.M., he left the motel and drove to a nearby tavern to watch a heavyweight championship fight that was being shown on television.

At the tavern, he met Appellee Donald W. Bierer, Jr. ("Bierer"), a friend he had known for about ten years. Bierer was employed as a car salesman by Appellee Dover Volkswagen, Inc. ("Dover VW") and had driven to the tavern that evening in a demonstrator vehicle that was owned by Dover VW. At the tavern, Pierce shared a pitcher of beer with Bierer and a co-worker of Bierer's. At approximately 1:00 A.M. Pierce and Bierer decided to go to a nearby restaurant for breakfast. When they got outside the tavern, Bierer offered to drive Pierce to the restaurant and then back to his car. Pierce

accepted the offer.

Enroute from the tavern to the restaurant, Pierce sustained serious personal injuries when Bierer's vehicle skidded on ice, went through a stop sign at an intersection, and was struck by a tractor trailer. Pierce has no independent recollection of how the accident occurred. Bierer was ultimately charged by the Dover City Police with "careless driving" under 21 Del.C. §4176(a), to which charge he entered a plea of guilty on February 20, 1978. On February 12, 1980, Pierce filed an action for personal injuries against Appellees Bierer and Dover VW; his wife, Ursula S. Pierce, brought a derivative action for loss of consortium.

(1) How the Issues Sought to Be Reviewed Were Raised and Decided In the Trial Court

The action was commenced by the Appellants in the Superior Court of the State of Delaware ("Trial Court"). The Complaint alleged, in the alternative, that the accident was caused

by either the ordinary negligence or the "willful or wanton misconduct" of the Appellees. In the Answer filed April 29, 1980, the Appellees denied any negligence and pleaded as an affirmative defense that the Appellants' claims based upon ordinary negligence were barred by the Delaware Automobile Guest Statute, 21 Del.C. §6101. Following discovery, the Appellees filed a Motion for Summary Judgment on Feburary 3, 1981.

The issues sought to be reviewed in this appeal were raised for the first time by the Appellant in the Appellant's Brief in Opposition to Motion for Summary Judgment, filed March 31, 1981. Therein, the Appellant conceded that he was a "guest without payment" under 21 Del.C. §6101 and that the circumstances of the accident did not rise to the level of willful or wanton misconduct by Appellees, as required by the Guest Statute, 21 Del.C. §6101. Appellants did contend, however, that the Guest Statute should not be applied because it was repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States

Constitution. Following oral argument, the Trial Court issued its Opinion and Order on October 29, 1981. The Trial Court specifically rejected the Appellants' claim that the Guest Statute was unconstitutional, stating that the constitutional issue was controlled by Justice v. Gatchell, Del. Supr., 325 A.2d 97 (1974)[1], wherein the Supreme Court of Delaware had previously upheld the Guest Statute against a similar constitutional challenge. The Trial Court therefore granted summary judgment in favor of Appellees on the basis of the Guest Statute. The decision of the Trial Court is set forth in the Appendix hereto at p. 9a.

(2) How the Issues Sought To Be Reviewed Were Raised and Decided In the Appellate Court

Appellants filed a timely appeal from the Trial Court decision to the Supreme Court of the State of Delaware. In the Briefs filed in that Court, the Appellants renewed their at-

1. For the convenience of the Court, the decision of the Supreme Court of Delaware in Justice v. Gatchell is set forth in the Appendix hereto at p. 17a.

tack on the Guest Statute on the ground of repugnancy to the Equal Protection Clause of the Fourteenth Amendment.

Specifically, Appellants argued that Justice v. Gatchell should be reconsidered and overruled because:

(1) The Court's reliance, in that case, on Silver v. Silver, 280 U.S. 117 (1929), as being dispositive of any equal protection challenge to the guest statute, was incorrect;

(2) the federal equal protection standard of review employed in Justice v. Gatchell and Silver v. Silver is contrary to the standard of review now employed by the United States Supreme Court in such cases;

(3) the Delaware Supreme Court's self-created "doctrine of judicial self-restraint", employed in Justice v. Gatchell, cannot be employed, as

a matter of federal constitutional law, where the Guest Statute is challenged as violative of the Fourteenth Amendment;

(4) under present day conditions, the classifications created by the Delaware Automobile Guest Statute do not advance any legitimate goals in a rational manner, and, hence, are violative of the Equal Protection Clause of the Fourteenth Amendment.

Following briefing and oral argument, the Supreme Court of Delaware issued its decision on July 9, 1981. All of the Appellants' arguments were rejected, the Court stating:

> "We have reviewed the cited cases relied upon by the plaintiffs and find none to be controlling. None involves a Guest Statute of this or any other state and, therefore, cannot be said to bespeak a shift in the Supreme Court's viewpoint on the subject.
>
> On the contrary, we find it significant that Silver, decided in 1929

still remains the last word by the U.S. Supreme Court on Automobile Guest Statutes in relation to equal protection rights." (p.6a).

* * * *

"Accordingly, we find nothing has developed since Justice v. Gatchell to alter the stare decisis value of that case as to the constitutionality of the Automobile Guest Statute. We adhere to the rationale adopted and conclusions reached therein. If changes are to be made, the General Assembly must take the action." (p. 7a).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. Preliminary Statement

The decision below, upholding the validity of 21 Del.C. §6101 against Appellants' equal protection challenge, rests squarely upon the Delaware Supreme Court's view that Silver v. Silver, 280 U.S. 117 (1929), wherein Connecticut's automobile guest statute was upheld against a similar equal protection challenge, "still remains the last word by the U. S. Supreme Court on Automobile Guest Statutes in relation to equal protection rights." (p.6a). The decision below also rests, in part, upon the Delaware Supreme Court's

view that its decision in Justice v. Gatchell Del. Supr., 325 A.2d 97 (1974), which was reaffirmed in this case, correctly defined and applied the equal protection standard of review presently employed by this Court in such cases. (p.7a).

In docketing this appeal, Appellants are certainly mindful that the mere existence of the Silver decision might tempt the Court to conclude that this appeal should be dismissed, "for want of a substantial federal question", because the constitutional issue "has been so explicitly decided [in Silver] as to foreclose further argument on the subject. Equitable Life Assurance Society v. Brown, 187 U.S. 308 (1902),at p. 314. Appellants urge the Court not to take that path. As we shall show herein, there are substantial and compelling reasons for the Court to accept jurisdiction in this case for the purpose of giving plenary reconsideration to Silver v.

Silver.[2]

If the Court is not inclined to reconsider Silver, then Appellants contend that the decision below still raises a substantial federal question whether the Delaware Supreme Court, as a matter of federal constitutional law, properly extended the ruling in Silver to the Delaware Guest Statute, and also whether the Delaware Supreme Court, in upholding the validity of the Delaware Guest Statute, cor-

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2. In urging the Court to reconsider Silver, Appellants recognize that, in recent years, this Court has summarily dismissed appeals raising similar constitutional claims involving the automobile guest statutes of other states. Cannon v. Oviatt, Utah Supr., 520 P.2d 883, appeal dismissed, 419 U.S. 810 (1974); White v. Hughes, Ark. Supr., 519 S.W.2d 70, appeal dismissed 423 U.S. 805 (1975); Hill v. Garner, Ore. Supr., 561 P.2d 1016, appeal dismissed 434 U.S. 989 (1977). Although these decisions also amount to rulings on the merits of the equal protection issue, Hicks v. Miranda, 422 U.S. 332 (1975), it is also true that such dismissals are not accorded the same deference, as precedent, given a ruling after briefing, argument and a written opinion, for purposes of determining whether a substantial federal question is present in a case. Caban v. Mohammed, 441 U.S. 380 (1979) at p. 390 n.9.

rectly applied the appropriate equal protection standard of review, as applied by this Court in such cases.

The above issues are discussed in the subsections which follow.

B. The Decision in Silver v. Silver is Ripe for Reconsideration.

There is no litmus test to determine when a prior decision of this Court is ripe for reconsideration. However, a review of decisions where such reconsideration has taken place does reveal several factors which the Court apparently considers significant in making such a determination. These factors are: (1) the issue has continued to be a source of litigation and controversy in both state and federal courts; (2) the prior decision has been the subject of continuing critical commentary; (3) various Justices of the Court have expressed the view that the prior decision should be reconsidered. Gideon v. Wainwright, 372 U.S. 335 (1963), at p. 4 n.2.

Automobile guest statutes have existed at one time or another in 28 states.[3] All guest statutes were enacted between 1927 and 1939. Note, The Present Status of Automobile Guest Statutes, 59 Cornell L. Rev. 659 (1974), at p. 659. If Silver v. Silver, decided by this Court in 1929, is still the "last word . . . on automobile guest statutes", as the Delaware Supreme Court has concluded, the message clearly did not reach the highest courts of 7 states which have since held their automobile guest statutes unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Brown v. Merlo, Cal. Supr., 506 P.2d 212 (1973); Thompson v. Hagan, Idaho Supr., 523 P.2d 1365 (1974); Laakonen v. Eighth Judicial District Court, Nev. Supr., 538 P.2d 574 (1974); McGeehan v. Bunch, N.M. Supr., 540 P.2d 238 (1975); Primes v. Tyler, Ohio Supr., 331 N.E.2d 723 (1975); Ramey v. Ramey, S. Car. Supr., 258

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3. In Georgia, the guest passenger rule was judicially created. Epps v. Parrish, Ga. Supr., 106 S.E. 297 (1921). Judicially created guest passenger rules also existed at one time in Massachusetts and Wisconsin, but have since been abolished.

S.E.2d 883 (1979); Henry v. Bauden, Kan. Supr., 518 P.2d 362 (1974).[4]

The highest courts in 4 additional states have held their state's guest statutes to be invalid under state constitution equal protection clauses only. Bierkamp v. Rogers, Iowa Supr., 293 N.W.2d 577 (1980); Mainistee Bank & Trust Co. v. McGowan, Mich. Supr., 232 N.W.2d 636 (1975); Johnson v. Hassett, N.Dak. Supr., 217 N.W.2d 771 (1974). Nehring v. Russell, Wyo. Supr., 582 P.2d 67 (1978).

Automobile guest statutes still exist today only in Alabama, Arkansas, Delaware, Indiana and Utah.[5] Even in these states, the

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4. Those state high courts also found their guest statutes to violate equal protection clauses in their respective state constitutions.

5. Guest statutes have been repealed or substantially modified in 12 other states: Colorado (repealed by L.75 p.1568, Sec.1 (1975)); Connecticut (Conn. Acts 4404, repealed 1937); Florida (Fla. Stat. Ann. §320.59, repealed 1972); Illinois (Ill. Stat. Ann. Ch. 95½ §10-201[statute

supposed "last word" status of the Silver decision has not resulted in any abatement to the frequency with which challenges to these remaining guest statutes continue to be litigated on equal protection grounds. Beasley v. Bozeman, Ala. Supr., 315 So.2d 570 (1975); White v. Hughes, Ark. Supr., 519 S.W.2d 70, appeal dismissed, 423 U.S. 805 (1975); Rone v. Miller, Ark. Supr., 520 S.W.2d 268 (1975); Davis v. Cox, Ark. Supr., 593 S.W.2d 180 (1980); Delaney v. Mize, Ark. Supr., 599 S.W.2d 710 (1980); Justice v. Gatchell, Del. Supr., 325

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modified in 1971 to limit application to hitchhikers]); Montana (repealed by Ch. 236, Laws of 1975); Nebraska (1981 Neb. Laws. L.B.54 p. 214 [modified statute so as to apply only to close relatives of owner or operator]); Oregon (reference to automobiles in guest statute deleted by Or. Laws 1979, Ch. 866, §7); South Dakota (repealed by S.L. 1978, Ch. 240 §1); Texas (Ch. 28, §3 (1973), law modified to apply only to close relatives of owner or operator); Vermont (repealed 1970); Virginia (Va. Code, §8.01-63 (1977 Rep. Vol)); Washington (repealed by Laws of 1974 1st Ex. Sess. Ch. 3, §2. In Massachusetts, a judicially created guest rule (Masaletti v. Fitzroy, Mass. Supr., 118 N.E.168 (1917)) was repealed by Mass. Ann. Laws, Ch. 231 §85L (Supp. 1972).

A.2d 97 (1974); Pierce v. Bierer , 447 A.2d 1189 (1982); Sidle v. Majors, 536 F.2d 1136 (C.A. 7, 1976), cert. den. 429 U.S. 945 (1976); Brady v. Acs, Ind. Supr, 342 N.E. 2d 837 (1976); Cannon v. Oviatt, Utah Supr., 520 P.2d 883, appeal dismissed 419 U.S. 810 (1974); Critchley v. Vance, Utah Supr., 575 P.2d 187 (1978); Corey v. Jones, 650 F.2d 803 (C.A. 5, 1981); Bickford v. Nolen, Ga. Supr., 240 S.E. 2d 24 (1977).

Given the frequency of litigation outlined above, it is hardly surprising that the issue has also been subjected to much scholarly analysis and comment -- all critical of guest statutes in general and Silver v. Silver in particular. Some examples are: Lascher, Hard Laws Make Bad Cases -- Lots of Them (The California Guest Statute), 9 Santa Clara Law, 1 (1968); Note, Review of the Past, Preview of the Future: The Viability of Automobile Guest Statutes, 42 U. of Cinn. L. Rev. 709 (1973); Broadbent, The Utah Guest Statute: Has It Overstayed Its Welcome? 1978 Utah L. Rev. p. 509; Note, Alabama's Automobile

Guest Statute: The Edsel Lives! 33 Ala. L. Rev. 79 (1981); Muehlen, Guest Statute Violates Equal Protection of the Law, 50 N. Dak, L. Rev. 139; Note, Equal Protection Challenges to Automobile Guest Statutes, 8 Creighton L. Rev. 432 (1974); Note, The Present Status of Automobile Guest Statutes, 59 Cornell L. Rev. 659 (1974); Joost, The Automobile Guest Rule: Sound Public Policy or Legal Dinosaur, 2 Portia L.J. 105 (1966); Note, The Case Against the Guest Statute, 7 William & Mary L. Rev. 321 (1966).

The nearly continuous stream of litigation involving equal protection challenges to automobile guest statutes and the mounting criticism of Silver and its progeny have not passed unnoticed by the Members of this Court. In recent years, on two separate occasions, Justices White, Brennan and Marshall have expressed the view, for the same reasons expressed here, that Silver should be reconsidered. Sidle v. Majors, supra, (Brennan, J., dissenting) at p. 945; Hill v. Garner, supra, (White J., dissenting) at p. 989.

If the criteria outlined in Gideon v. Wainwright, supra, are any benchmark, the conflict and criticism that the Silver decision has spawned warrants that it be reconsidered, by any standard of measurement. Rather than settling the issue of the constitutionality of automobile guest statutes, Silver has been criticized and distinguished away in the 23 states where guest statutes have been nullified or repealed. In those states such as Delaware, where Silver is still regarded as "the last word" on the subject, the result has been challenge after challenge, rather than acceptance.

In this case, the Delaware Guest Statute was upheld against an equal protection challenge solely on the basis of Silver v. Silver. If, as we contend, Silver is now ripe for reconsideration, then this appeal raises a substantial federal question.

C. The Supreme Court of Delaware Did Not Apply the Proper Equal Protection Standard of Review

In the Supreme Court of Delaware, Appel-

lants contended that the Guest Statute's validity, under the Equal Protection Clause, could no longer be sustained on the basis of Silver v. Silver, supra, or Justice v. Gatchell, supra, because the "rational basis" equal protection analysis employed in those cases had been abandoned, as a matter of federal constitutional law, as evidenced by more recent decisions of the United States Supreme Court. This argument was explicitly rejected by the Supreme Court of Delaware:

> "The plaintiffs further remind us of the comment in Justice: 'If . . . the strictures of the Fourteenth Amendment [are to be] extended in this area of the law, we shall await the views of the United States Supreme Court on the subject.' (325 A.2d at 102). Those views have been manifested, plaintiffs assert, in a number of recent cases all of which, they say, now require a reversal of Justice. Specifically, plaintiffs cite U.S.R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 101 S.Ct. 453 (1980); Minnesota v. Clover Leaf Creamery Company, 449 U.S. 456, 101 S.Ct. 715 (1981); Schweiker v. Wilson, 450 U.S. 211, 101 S.Ct. 1074 (1981); and Logan v. Zimmerman Brush Co., _____ U.S. _____, 102 S.Ct. 1148 (1982)
>
> We have reviewed the cited cases relied upon by the plaintiffs and find none to be controlling. None involves a Guest Statute of this or any other state, and therefore, can-

not be said to bespeak a shift in the Supreme Court's viewpoint on the subject." (p.6a- 7a)

Appellants agree that the standard of review applicable to the Delaware Guest Statute, 21 Del.C. §6101, under the Equal Protection Clause is the "rational basis" test. Schweiker v. Wilson 450 U.S. 221 (1981) at p.230; Justice v. Gatchell, supra, at p.100 n.7 (p.25a).[6] Also, it is settled that the definition and application of the rational basis test is a matter of federal constitutional law, and that a state court's application of that standard is fully reviewable in this Court on appeal, where the decision below is in favor of the validity of the statute. 28 U.S.C. §1257(2). Cf. Minnesota v. Clover Leaf Creamery Company, 449 U.S. 456 (1981), at p.461 n.6.

In upholding the validity of the Guest Statute on the basis of Silver and Justice, the Supreme Court of Delaware necessarily concluded

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6. In the decision below, the Supreme Court of Delaware stated that the rationale and conclusions in Justice v. Gatchell, supra, were equally applicable to this case. (p.7a).

that those cases still express the correct statement and application of the rational basis test. Also, in distinguishing the more recent rational basis equal protection decisions cited by Appellants the Supreme Court of Delaware implicitly concluded that even if those decisions embody or announce a different statement or application of the rational basis test than Silver and Justice, such decisions should be disregarded because the particular statute under review in those cases "were not Guest Statute(of this or any other State". (p.6a). Appellants submit that the decision below, as outlined herein, raises a substantial federal question whether the Supreme Court of Delaware properly defined or applied the rational basis test to the Delaware Guest Statute as a matter of federal constitutional law.

In Silver v. Silver, supra, the Connecticut automobile guest statute was upheld according to the following equal protection standard of review:

> "It is said that the vice in the statute is not that it distinguishes between passengers who pay

> and those who do not, but between gratuitous passengers in automobiles and those in other classes of vehicles. But it is not so evident that no grounds exist for the distinction that we can say a priori that the classification is one forbidden as without basis, and arbitrary." See Clark v. Deckebach, 274 U.S. 392, 397. Id at p. 123. (emphasis added)

In Justice v. Gatchell, supra, the Supreme Court of Delaware upheld the Delaware Guest Statute under the following equal protection standard of review:

> "In the area of equal protection especially, courts have traditionally afforded legislative classifications a presumption of reasonableness and constitutionality where discrimination is not based upon race, color, religion, ancestry, or other 'inherently suspect' classification requiring a more 'strict scrutiny'. 1 Antieau, Modern Constitutional Law §8.81, p. 630 (1969). A statutory discimination or classification will not be set aside if any state of facts reasonably may be conceived to justify it. McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961): Aetna Casualty & Surety Co. v. Smith, Del.Supr., 36 Del.Ch. 391, 131 A.2d 168 (1957)." Id at p. 102 (p.31a)

In the past, this Court has employed many different formulations of the rational basis equal

protection test.[7] Also, the issue of the proper expression and application of the rational basis test has been the subject of much recent debate and disagreement among the Justices of this Court.[8]

Most recently, in Schweiker v. Wilson, supra, a majority of the Court formulated the rational basis test so as to require the court to determine (in order to sustain the challenged statute) that:

> (1) the statute bears a rational relation to legitimate legislative goals; Id at p. 242-243.
>
> (2) that the classificatory line drawn by the legislature "is not wide of any reasonable mark". Id at p. 238 n.23.

In terms of the judicial role, the "any

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7. See the cases cited in U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980) at p. 176 n.10.

8. See, U.S. Railroad Retirement Board v. Fritz, supra, at p. 176, n.10; Schweiker v. Wilson, supra, (Powell, J., dissenting) at p. 243 n.4.

conceivable basis" standard of Silver and Justice literally forecloses any judicial review of the challenged statute, except perhaps for the tautological recognition that the legislature did what it intended to do. U.S. Railroad Retirement Board v. Fritz, supra, (Stevens, J., concurring) at p. 180. The Schweiker "rational relation to legitimate legislative goals" test, on the other hand, requires the Court, at the minimum, to determine that the statute is not the result of official arbitrariness, unthinking prejudice, or favoritism U.S. Railroad Retirement Board v. Fritz, supra, (Stevens, J., concurring) at p.181; see, Michelman Politics and Values, Or What's Really Wrong With Rationality Review, 13 Creighton L.Rev. 487, 499 (1979).

The differences between Silver and Justice, on the one hand, and Schweiker, on the other, in terms of the expression and application of the equal protection rational basis test involve more than semantics. Appellants contend that the differences rise to a constitutional level, so that the Delaware Supreme

Court's adherence to the Silver and Justice test, in the face of this Court's decision in Schweiker, raises a substantial federal question.

Evidence that the Schweiker rational basis test is a constitutional rule is to be found in this Court's recent decision in Clements v. Fashing, _____ U.S. _____, 102 S.Ct. 2836 (1982). In Clements, certain provisions of the Texas Constitution relating to qualifications for elective office were challenged under the Equal Protection Clause. The majority opinion in the case was authored by Justice Rehnquist. In Part III of the Opinion (102 S.Ct. at p. 2843), Justice Rehnquist framed the rational basis test as empowering the court to strike down a classification "only if . . . based solely on reasons unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." Id. The above statement of the rational basis test is nearly identical to Silver and Justice. However, in Clements, the above statement of the rational basis test was specifically rejected by five Justices of this Court. Clements v. Fashing,

supra, (Brennan, J., dissenting) at p. 2850 n.1. Or the issue of the proper statement of the rational basis test, the four dissenting Justices were joined by Justice Stevens, who stated that he "surely could not subscribe to Justice Rehnquist formulation of the standard to be used in evaluating state legislation that treats different classes of persons differently." Clements v. Fashing, supra, (Stevens, J., concurring in the judgment), at p. 2850.

If the rational basis test, as formulated and applied in Schweiker v. Wilson, is a constitutional rule, it is binding on the Supreme Court of Delaware under the Supremacy Clause of Article VI of the Constitution. The reason given by the Supreme Court of Delaware for not applying the Schweiker rational basis test, i.e. the particular statute involved in Schweiker was not a "guest statute",must be rejected, for it practically flaunts the supremacy rule in favor of the narrowest possible interpretation of constitutional rules announced by this Court. Cf. Sims v. Georgia, 385 U.S. 538 (1966) at p.543.

Finally, even if the Supreme Court of Delaware had employed the proper equal protection rational basis analysis in this case and in Justice v. Gatchell, there is another aspect to its decisions which raises a substantial federal question. That is in the application in this case of the Supreme Court of Delaware's self-created "doctrine of judicial self-restraint" as applied to a statute challenged on federal equal protection grounds. (p.4a). In Justice v. Gatchell, supra, the doctrine was expressed as follows:

> "Having reached that conclusion, we become mindful of the traditional self-restraint of this Court whenever it becomes engaged in testing the constitutionality of an act of the General Assembly. Such self-imposed limitation has been expressed by this Court in varying but consonant terms; Legislative acts should not be disturbed except in clear cases, and then only upon weighty considerations; a legislative enactment is cloaked with a presumption of constitutionality and should not be declared invalid unless its invalidity is beyond doubt."
> Id at p.102 (p.29a).

When combined with the "any conceivable basis" equal protection standard, the doctrine

of judicial self-restraint virtually immunizes the Delaware Guest Statute from judicial review. As an independent ground for upholding the guest statute against a federal constitutional challenge, the doctrine has no parallel in federal constitutional law. In tilting the balance of power almost entirely in favor of the legislature, the doctrine imposes a greater restriction on the scope of judicial review than this Court imposes in such cases. Although we concede that the doctrine may be properly applied in non-federal constitutional cases, its application in this case was clearly improper. Minnesota v. Clover Leaf Creamery Company, supra, at p. 461. n.6.

D. The Delaware Guest Statute Is Repugnant to the Equal Protection Clause of the 14th Amendment

The Delaware Guest Statute, 21 Del.C. §6101 provides:

> "(a) No person transported by the owner or operator of a motor vehicle, boat, airplane or other vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or op-

erator for injury, death or loss, in case of accident, unless such accident was intentional on the part of such owner or operator or was caused by his wilful or wanton disregard of the rights of others.

(b) Subsection (a) of this section shall not relieve a public carrier or any owner or operator of a motor vehicle while the vehicle is being demonstrated to a prospective purchaser or responsibility for any injuries sustained by a passenger being transported by such public carrier or by such owner or operator."

There is no recorded legislative history for the guest statute, which was enacted in 1933.[9] Traditionally, the classification thus drawn, as between "guests without payment" and all other occupants of a motor vehicle, requiring the former to prove "willful or wanton conduct" to recover damages for personal injuries, while allowing the latter to recover damages upon proof of ordinary negligence only, has been justified on two grounds:

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9. 38 Del. Laws, Ch. 26. An earlier version of the guest statute, which denied any recovery to a guest passenger,was declared unconstitutional in Coleman v. Rhodes, Del. Supr, 159 A.649 (1932). Also, the present statute was amended in 1949 to include reference to "boats airplanes and other vehicles". 47 Del. Laws Ch. 49.

(1) the protection of the hospitality of the host, and (2) the prevention of collusive litigation. Justice v. Gatchell, supra; at p. Robb v. Ramey Associates, Del. Super, 14 A.2d 394 (1940); Gallegher v. Davis, Del. Supr, 183 A.620 (1936).

In terms of equal protection rationality analysis, the judicial task is to determine if the above rationales for the guest statute are "legitimate governmental objectives" under present day conditions, and whether the classification drawn by the legislature "advances those objectives in a rational way". Schweiker v. Wilson, supra, at p. 234.

Appellants contend that the above legislative purposes can no longer be employed to justify the continued rationality of the Guest Statute. In the nearly 50 years since Delaware's Guest Statute was enacted, the relevant circumstances which previously justified its enactment have undergone such radical change that the guest statute is now an anachronism that is, indeed, antithetical to Delaware's current legis-

lative policies.

When Delaware's Guest Statute was enacted, the automobile age was in its infancy. There was approximately one passenger car for every five persons in the United States.[10] In those early days, the notion that guests in motor vehicles should be severely restricted in recovering damages from their host might well have been viewed as a socially acceptable cost to encourage those persons who owned automobiles to share the benefits of private transportation, much in the manner that "good samaritan" statutes encourage persons to render emergency assistance to injured persons. This emphasis on the protection of the host was no doubt reinforced by the then prevailing philosophy that automobile liability insurance was a protective rather than a compensatory device. See Weber, Guest Statutes, 11 U. Cinn. L. Rev. 24 (1937). In Delaware, the philosophy that liability insurance was viewed as a protective device is evidenced by the fact that the

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10. U.S. Bureau of the Census, Statistical Abstract of the United States (60th Ed., 1938), Tables 2, 429.

legislature did not enact a compulsory automobile liability insurance law until 1972.[11]

In today's society, where ownership and dependence on the automobile as a means of personal transportation is nearly universal,[12] the presence or absence of a Guest Statute does not affect the decision of friends or relatives to ride together in an automobile. Drivers may hesitate to pick up hitchhikers or other strangers, but not because of potential liability for negligence, ordinary or gross. Friends and relatives offer, seek, accept and decline rides with each other for reasons quite apart fron the ability to recover for negligently inflicted injury or loss. The presence of a guest

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11. Prior to 1972, Delaware had a "financial responsibility"law, which required a driver to show proof of financial responsibility only after the first accident. 29 Del.C. §2921, repealed by 60 Del. Laws 433, §4 (1976).

12. In 1979, there was one registered passenger car for every 2.1 persons in the United States U. S. Bureau of the Census, Statistical Abstract of the United States (100th Ed., 1979), Tables 2, 1101.

statute and its invidious discrimination thus no more promotes hospitality that its absence would tend to chill such activities.

These changing patterns in automobile use and dependency, together with the recognition that negligent use of the automobile causes staggering losses, in terms of personal injury, death, and property damages, has led to the nearly universal adoption of compulsory liability insurance laws. The adoption of such laws is clear evidence of the acceptance of the concept that such insurance is a compensatory rather than a protective device. According to one court, one of the most evident policies behind the enactment of such laws is to provide compensation to those injured through no fault of their own. Interinsurance Exchange of Auto Club v. Ohio Casualty Ins. Co., Cal. Supr., 373 P.2d 640, 645, (1962).

Since 1972, all motor vehicles registered in Delaware have been required to have insurance to indemnify the owner or operator from legal liability for bodily injury or death arising from the

ownership or use of the vehicle. 21 Del. C. §2118(a)(1). However, the current incongruity of the host protection doctrine does not rest alone on the enactment of compulsory insurance laws. This is so because Delaware has also enacted a so-called "no-fault" insurance scheme.

In addition to the required liability insurance, 21 Del. C. §2118(a)(2) requires the owner of a motor vehicle to pay compensation, irrespective of fault, to certain injured persons for their medical expenses and lost wages. This required coverage is known as PIP (personal injury protection) coverage. Under §2118(c), the PIP benefits are paid to each passenger occupying the owner's vehicle. Since Section 2118(c) makes no distinction between passengers who are non-paying guests and other passengers, the PIP benefits are thus available to guests and non-guests alike.[13] The continued existence of the Guest Statute thus makes possible the situation,

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13. In this case, Appellant Pierce was paid substantial PIP benefits by Appellees' insurance carrier.

which occurred in this case, whereby an injured guest passenger recovers compensation from his host for medical expenses and lost wages, without being required to prove any negligence on the part of the host, and yet is barred from recovering for pain and suffering or permanent injuries from the same "host" unless he can prove "willful or wanton misconduct".[14]

Since everyone is a potential "guest passenger", guests as a class are identically situated to the public as a whole in their ability to bear the economic consequences of a negligently inflicted injury. Also, the issue of ordinary negligence on the part of the vehicle operator is totally unrelated to the presence or absence of "guest passengers". By thus absolving some drivers from liability for ordinary negligence, the Guest Statute randomly denies some

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14. Several commentators have specifically noted the irrationality of the continued existence of guest statutes in states that have enacted "no fault" insurance schemes. See, Note, supra, 59 Cornell L. Rev. at p. 684-685; Broadbent, supra, 1978 Utah L. Rev. p. 509.

persons the protection of compulsory insurance laws by converting similar claims (all claims based on ordinary negligence) into dissimilar ones (guest vs. non-guest) and then using the distinction as the basis for the classification. Appellants submit that such random different treatment of identical claims is the essence of arbitrary state action. Cf. Logan v. Zimmerman Brush Co., _____ U.S. _____, 102 S.Ct. 1148 (1982), (Blackmun, J., separate opinion) at p. 1159-1161.

By enacting a comprehensive scheme of compulsory liability and no-fault insurance, the Delaware legislature has clearly abandoned the philosophy of "host protection" in favor of a public policy which assures compensation to persons who are injured through no fault of their own. The Guest Statute is irrational because it continues to rely on this discarded philosophy to deny to randomly determined persons the protection of compulsory insurance laws. What once may have been an act of legislative policy (wise or unwise) is now only an act of discrimination.

The second justification traditionally offered in support of the Guest Statute's classification scheme is the prevention of collusive litigation. Justice v. Gatchell, supra. This rationale proceeds from the premise that because guest passengers are often friends or relatives of the driver, they will "cooperate" to manufacture ordinary negligence in order to recover compensation for injuries from the "real" defendant -- the driver's insurance company.

Even if it is conceded that the legislative goal of preventing collusive lawsuits is a legitimate one, it nevertheless remains for the court to determine whether the means chosen -- requiring non-paying guests to prove willful or wanton conduct -- "advances legitimate legislative goals in a rational fashion". Schweiker v. Wilson, supra at p. 234.

The Guest Statute's classification, by definition, involves line-drawing which inevitably leaves some persons "outside the favored circle". Id at p. 238. In testing the rationality of a legislative classification under the rational

basis equal protection test, this Court has recognized the legislative need for approximation in choosing the means of serving the legislative end. In Dandridge v. Williams, 397 U.S. 471 (1970), the court stated that a classification would be upheld even though it was "not made with mathematical nicety or because in practice it results in some inequality". Id at p. 485. Most recently, in Schweiker v. Wilson, supra, the court stated that the decision of the legislature as to where the line should be drawn, "must be accepted unless we can say that it is very wide of any reasonable mark". Id at p. 238 n.23.

On the other hand, judicial tolerance of legislative approximation does have its limits. The rational basis standard is "not a toothless one". Schweiker v. Wilson, supra, at p. 234. The judicial task in this regard was aptly summarized by Justice Powell:

> " . . . the equal protection requirement does place a substantive limit on legislative power. At a minimum, the legislature cannot arbitrarily discriminate among citizens . . . . Enforcing this prohibition while avoid-

> ing unwarranted incursions on the legislative power presents a difficult task. No bright line divides the merely foolish from the arbitrary law." Schweiker v. Wilson, supra, (Powell,J., dissenting) at p. 243.

Notwithstanding the difficulty of the judicial task and the tolerance of legislative imprecision, there is one species of classification that the court has consistently invalidated under the rational basis standard. That species is the classification that is, at the same time, both "underinclusive" and "overinclusive" as a means of achieving the supposed legislative goals. Rinaldi v. Yeager, 384 U.S. 305 (1966); Lindsey v. Normet, 405 U. S. 56 (1972).

In Rinaldi, the Court invalidated a New Jersey statute which required indigent prison inmates who filed unsuccessful appeals to reimburse the court for the cost of the free transcript. No such reimbursement was required of non-inmates whose appeals were unsuccessful. Rinaldi v. Yeager, supra at p. 307. The state defended the statute as a rational means for deterring frivolous appeals. Id at p. 310. The statute in Rinaldi was

"overinclusive" because it irrationally assumed that all unsuccessful appeals by prisoners were frivolous. It was also "underinclusive" because it assumed that all unsuccessful appeals by non-prisoners were not frivolous. Id.

In Lindsey v. Normet, supra, the Court invalidated a statute which required a tenant to post a double-bond in order to appeal an adverse eviction judgment. The statute was defended as a reasonable means of detering frivolous appeals. The court rejected this argument, stating that the double-bond requirement was irrational to serve such purpose because it precluded meritorious appeals by those who could not afford the bond (overinclusive) and at the same time allowed meritless appeals by those who could afford the bond (underinclusive). Id p. 78.

Appellants contend that the Guest Statute is equally overinclusive and underinclusive as a means of preventing collusive litigation. As such, it stands on the same footing as the statutes invalidated in Rinaldi and Lindsey, Cf. Logan v. Zimmerman Brush Co., supra, (Blackmun, J., separate opinion) at p. 1160.

The Guest Statute is overinclusive because it irrationally assumes that all non-paying guests will conspire with their hosts to manufacture ordinary negligence. The Guest Statute thus sweeps within its ambit all claims by honest guests, all claims against honest hosts, all claims where negligence exists in fact, and even claims on behalf of persons such as infants, incompetents and deceased persons, who are incapable of collusion.

The Guest Statute is equally underinclusive as a means of preventing collusive lawsuits. By irrationally assuming that collusion will occur in all cases of ordinary negligence, the Guest Statute leaves untouched the fact that the circumstances that will take a case out of the operation of the Guest Statute are equally susceptable to fabrication as is negligence. Assuming that some hosts are willing falsely to admit negligence to enable some of their guests to recover against their insurance companies, they might be as willing falsely to admit gross negligence. Similarly, a showing that the journey was motivated in part by a definite tangible benefit to the host, re-

quires less imagination than fabrication of facts showing ordinary negligence. Foster v. Shropshire, Del. Supr., 375 A.2d 458, 460 (1977) (courts should "be wary of legal meanderings which too often result in bypassing the dictates of the Guest Statute). In fact, such cases (there are many of them) lend credibility to the proposition that the harsh operation of the Guest Statute, particularly in the face of the strong public policy that liability insurance is a compensatory device, actually promotes collusive litigation rather than prevents it.

CONCLUSION

For the foregoing reasons, this Court should determine that the questions presented herein are substantial and should note probable jurisdiction of this appeal.

Respectfully Submitted,

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STATEMENT PURSUANT TO RULE 28.4(c)

This appeal draws into question the constitutionality, under the Equal Protection Clause of the 14th Amendment to the United States Constitution, of Section 6101, Title 21 of the Delaware Code.

The State of Delaware or any agency, officer or employee of the State is not a party to the appeal and the provisions of 28 U.S.C. §2403(b) may be applicable.